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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962

No. 32

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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FRANKLIN-GREALY COMPANY, CHICAGO — 865

TABLE OF CONTENTS.

	PAGE
Opinion Below	1
Jurisdiction	2
Statutes Involved	2
Question Presented	3
Statement of the Case	4
Summary of Argument	6
Argument	8
The Writ of Mandamus Issued by the Court Below Is Based on a Misinterpretation of the Requirements of Full Faith and Credit and Divests the Federal Courts of Jurisdiction Granted by Congress	8
Conclusion	17

TABLE OF AUTHORITIES.

Cases.

Angel v. Bullington, 330 U. S. 183, 190, 191 ..... 6, 12

Baltimore S. S. Co. v. Phillip, 274 U. S. 316, 319 15

Brainard v. Atchison, Topeka & Santa Fe Ry. Co., U. S. D. Ct., Kan., 87 F. Supp. 921 16

Corton v. L. & N. R. Co., 14 Ill. 2d 144, 152 N. E. 2d 385, 392, 398 ..... 7, 11, 13

Cromwell v. Sac County, 94 U. S. 351 ..... 7, 14

Merriam v. Saalfield, 241 U. S. 22, 28 ..... 6, 10

Norwood v. Kirkpatrick, 349 U. S. 29, 33 ..... 7, 13

Remington v. Central P. R. Co., 198 U. S. 95, 99, 100 .... 7, 16

Rodriguez v. Pan American Life Insurance Co., 5th Cir., 311 F. 2d 429, 433, 434 (1962) 6, 8

TABLE OF CITATIONS

Cases

PAGE

Angel v. Bullington, 330 U.S. 183 (1947) 4, 5

Baldwin v. Iowa State Traveling Men's Association, 283 U.S. 522 (1931) 5

Chicago, Rock Island & Pacific R.R. v. Igoe, 220 F.2d 299 (7th Cir.), cert. denied, 350 U.S. 822 (1955) 6

Chicago, Rock Island & Pacific R.R. v. Schendel, 270 U.S. 611 (1926) 5

Chicago Title & Trust Co. v. National Storage Co., 260 Ill. 485, 103 N.E. 277 (1913) 4

Gaddis v. Nash, 304 Ill. App. 259, 26 N.E. 2d 139 (1st Dist. 1940) 3

Healea v. Verne, 343 Ill. 325, 175 N.E. 562 (1931) 4

Jiffy Lubricator Co. v. Stewart-Warner Corp., 177 F. 2d 360 (4th Cir. 1949) 3

LaBuy v. Howes Leather Co., 352 U.S. 249 (1957) 6

Wayside Transportation Co. v. Marcell's Motor Express, Inc., 281 F.2d 868 (1st Cir. 1960) 4

Statutes and Rules

28 U.S.C. § 1404(a) 2

28 U.S.C. § 1738 ..... 2, 4

45 U.S.C. § 56 3

Rules of the Supreme Court of the United States
Rule 23 (4) 3
Rule 23 (1)(c) 6

Ill. Rev. Stat. ch. 110, § 77 (1961) 1, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 573

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

VS.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW AND JURISDICTION.

The opinion of the Court of Appeals is reported at 307 F. 2d 924. On motion of Petitioner the writ of mandamus was stayed by order of the Court of Appeals on October 4, 1962, to permit petition for certiorari. Otherwise, the statements in the petition as to the opinion below and the jurisdictional requirements are correct.

STATUTES INVOLVED.

In addition to the statutes set forth in the petition, ILL. REV. STAT. ch. 110, §77 (1961) is pertinent. This statute is in the appendix to this brief.

STATEMENT OF THE CASE.

In 1961, Jack J. Filbrun, a resident of Ludington, Michigan, filed an FELA action in the Circuit Court of Cook County, Illinois against the Respondent (hereafter "the C & O") seeking damages for an accident which occurred in Ludington, Michigan. The Illinois state court granted the C & O's motion to dismiss Filbrun's action for *forum non conveniens*. A petition for rehearing was denied. No appeal was taken.

Instead Filbrun filed the same action in the United States District Court for the Northern District of Illinois sitting within six blocks of the state court. The C & O moved to transfer the case under 28 U.S.C. §1404(a) to the United States District Court in Grand Rapids, Michigan, on the ground, among others, that the final judgment of the Circuit Court of Cook County required such transfer. Petitioner denied the C & O's motion.

The C & O then sued out an original petition for writ of mandamus in the Court of Appeals for the Seventh Circuit praying that Petitioner be compelled to transfer Filbrun's action. On June 27, 1962, that Court entered an order denying the petition. Thereafter, on rehearing, this order was vacated and set aside. A writ of mandamus issued directing Petitioner to transfer Filbrun's case to the United States District Court for the Western District of Michigan, Southern Division, Grand Rapids, Michigan, a court sitting within sixty miles of Filbrun's home and place of accident.

The Court of Appeals held that the principles of *res judicata* ("estoppel by verdict"), as implemented by the full faith and credit statute, 28 U.S.C. §1738, required this result.

ARGUMENT.

I.

The Petition for Writ of Certiorari Should Be Denied for Failure to Comply with Rule 23 of This Court.

The Petitioner's statements dwells at length upon matters which have no relevance to the Question Presented. This alone is sufficient reason to deny the petition for writ of certiorari. SUPREME COURT RULE 23 (4).

II.

The Decision of the Court of Appeals Correctly Applies the Law of Res Judicata as Implemented by the Full Faith and Credit Statute.

Filbrun, with full freedom to choose any one of a number of forums (45 U.S.C. §56), first brought his action in the Circuit Court of Cook County. That court, after consideration of detailed affidavits, counter-affidavits, written briefs, arguments and re-arguments, entered an order dismissing Filbrun's action for *forum non conveniens*. This was a final, appealable order. ILL. REV. STAT. ch. 110, §77 (1961); *Gaddis* v. *Nash*, 304 Ill. App. 259, 26 N.E. 2d 139 (1st Dist. 1940) (Abst.); *Jiffy Lubricator Co.* v. *Stewart-Warner Corp.*, 177 F. 2d 360, 362 (4th Cir. 1949) ("... a dismissal [for *forum non conveniens*] ... puts an end to the action and hence is final and appealable.").

Filbrun did not appeal. Instead he chose to file his same claim in the United States District Court for the Northern District of Illinois, thus attempting to relitigate the same issue upon which the state court had entered final judgment

Secco v. Chicago Transit Authority, 2 Ill. App. 2d 239, 119 N. E. 2d 471 11
Stangle v. Chicago, Rock Island & Pacific R. R. Co., 7th Cir., 295 F. 2d 789 15
Sypert v. Miner, 7th Cir., 266 F. 2d 196, 198 11
Wayside Transportation Co. v. Marcell's Motor Express, Inc., 1st Cir., 284 F. 2d 868, 870 ..... 6, 9, 10, 11

Statutes.

Federal Employers' Liability Act § 6, 35 Stat. 66, 45 U. S. C. 56 ..... 3, 7, 14
Judicial Code of 1948 § 1404 (a), 62 Stat. 937, 28 U. S. C. § 1404 (a) 2, 10, 13, 14
Judicial Code of 1948 § 1738, 62 Stat. 947, 28 U. S. C. § 1738 ..... 2, 10, 15

Miscellaneous.

Rule 45 (e) (1) Federal Rules of Civil Procedure 12

IN THE

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No. 573

THE HONORABLE JAMES B. PARSONS, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINION BELOW.

The second Opinion of the Court of Appeals for the Seventh Circuit (R. 84-91) is reported at 307 F. 2d 924.

JURISDICTION.

The judgment of the Court of Appeals on rehearing was entered September 7, 1962 vacating the Court's denial of a writ of mandamus entered June 27, 1962, and entering a writ of mandamus compelling the transfer of an action under the Federal Employers' Liability Act to the United States District Court at Grand Rapids, Michigan. A Petition for Rehearing on the judgment of September 7. 1962 was denied by the Court of Appeals on October 4, 1962. The petition for a writ of certiorari was filed November 3, 1962 and was granted January 7, 1963. The jurisdiction of this Court rests on 28 U. S. C. § 1254 (1).

STATUTES INVOLVED.

Section 1404 (a) of the Judicial Code of 1948, 62 Stat. 937, 28 U. S. C. § 1404 (a), provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Section 1738 of the Judicial Code of 1948, 62 Stat. 947, 28 U. S. C. § 1738, provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Section 6 of the Federal Employers' Liability Act as Amended, 35 Stat. 66, 45 U. S. C. 56, provides:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

QUESTION PRESENTED.

Whether full faith and credit requires a district court on a motion to transfer under 28 U. S. C. § 1404 (a) to transfer an action brought under the Federal Employers' Liability Act that had previously been dismissed by a state court in the same district on the ground that it "was an inconvenient and inappropriate forum".

STATEMENT OF THE CASE.

This case arises out of a cause of action brought on behalf of a plaintiff who was, and is, a resident of Ludington, Michigan. The case involves only the question of the ruling of the United States District Court in denying a motion to transfer that cause of action to Grand Rapids, Michigan on the motion of the respondent brought under the provisions of 28 U. S. C. § 1404 (a). The Court of Appeals in its second Opinion issued a writ of mandamus compelling the transfer sought by respondent.

The underlying cause of action grew out of facts in which the plaintiff was injured while employed by the railroad in its East Yard in Ludington on July 15, 1960. He was operating a hand brake on a box car when it suddenly released and threw him to the ground. Preceding the instant suit in the District Court, plaintiff filed an action in the Circuit Court of Cook County. The railroad filed a motion to dismiss on the ground that the Circuit Court of Cook County was an inconvenient and inappropriate forum (R. 10-20). That Court dismissed the action on the ground that it "was an inconvenient and inappropriate forum" (R. 27).

Plaintiff then filed the action involved herein in the District Court in Chicago on July 11, 1961. On August 23, 1961, the Respondent filed its Motion to Transfer under 28 U. S. C. § 1404 (a) (R. 43-53).

The railroad's Motion to Transfer was denied on December 7, 1961 and it was given 30 days to Answer (R. 60). On January 10, 1962, the railroad filed its Answer which stated that it was without knowledge or information sufficient to form a belief as to the truth of the plaintiff's allegation that while he was attempting to release the hand

brake, it suddenly and violently released causing him to fall from the car (R. 71, 39).

On February 9, 1962, the railroad was granted a rehearing of its Motion to Transfer on its petition (R. 61, 62). Oral argument was heard and briefs were submitted on the rehearing. The Motion to Transfer, on rehearing, was denied on March 20, 1962 (R. 63).

On such facts, the Court of Appeals first handed down an Opinion denying the writ of mandamus sought by the railroad (R. 75-82). On rehearing, that Court set aside its previous Opinion and issued the writ of mandamus based on its conclusion that Petitioner was without discretion and was required to recognize the decision of the Circuit Court of Cook County and was, therefore, required to transfer the case to the United States District Court at Grand Rapids, Michigan (R. 84-91). In accordance with this Opinion, the Court of Appeals issued a writ of mandamus on September 7, 1962 compelling Petitioner to transfer the cause (R. 91, 92). Rehearing was denied on October 4, 1962 (R. 92). On October 23, 1962, the execution of the judgment of mandamus was stayed for a period of 30 days from October 4, 1962, and until final disposition by the Supreme Court of the United States if a petition for certiorari was filed within the 30 day period (R. 93). There is no suggestion in any of the Opinions of the Seventh Circuit that the Petitioner here in any way abused his discretion in ruling upon the Motion to Transfer under 28 U. S. C. § 1404 (a).

This Petition seeks a review only of the Opinion and Order divesting Petitioner of all discretion and of any power to consider the Motion to Transfer in accordance with the provisions of 28 U. S. C. § 1404 (a).

SUMMARY OF ARGUMENT.

The basic federal question is whether error was committed by the court below when it held that Petitioner was required to transfer this case because a state court had previously exercised its discretion and dismissed the same cause of action. The only other case involving subject matter remotely similar suggests that a contrary result might occur. *Rodriguez* v. *Pan American Life Insurance Co.*, 5th Cir., 311 F. 2d 429, 433, 434 (1962). The authority relied on by the court below does not support its dicision because it is solely based on *res judicata*; full faith and credit is involved only to the extent that it implements *res judicata*. *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 1st Cir., 284 F. 2d 868, 870.

Respondent relies on *res judicata* but the court below did not. *Res judicata* is inapplicable since a final judgment is not involved. *Merriam* v. *Saalfield*, 241 U. S. 22, 28. Indeed, no one has so suggested. Petitioner accorded comity to the judgment of dismissal; nothing more was required.

The court below erroneously divested Petitioner of discretion vested in him by Congress. The court ignored the material factual differences in the two motions as well as the applicable Illinois law in so ruling. That the Petitioner and the state court were courts of concurrent jurisdiction is irrelevant.

No authority has been provided for the assertion that other state courts in Cook County would have dismissed. The assertion is irrelevant since all courts must be barred before the party can be foreclosed from litigating a federal question in the federal courts. *Angel* v. *Bullington*, 330 U. S. 183, 190, 191.

The judgment below deprives the federal court of territorial jurisdiction bestowed by Congress. Mandamus was granted to obliterate Petitioner's discretion despite the broad discretion vested in Petitioner to decide the federal Motion to Transfer. *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 33. The question decided by the Circuit Court of Cook County ignores the sole question presented by the applicable Illinois law. *Cotton* v. *L. & N. R. Co.*, 141 Ill. 2d 144, 152 N. E. 2d 385. The substantial difference in the nature of the two motions precludes the holding below. The fact that plaintiff did not appeal the discretionary order of the state court does not prevent him from exercising his federal right to a choice of forum.

The doctrine of estoppel by verdict is not applicable since there was no final judgment in the state court. Indirect estoppel by verdict is inapplicable because the same cause of action was involved in both forums. *Cromwell* v. *Sac County*, 94 U. S. 351.

Reason and common sense are offended by the result below. Policy considerations should be in accord with the reasonable expectations of the courts and litigants. The better rule would allow the second forum to decide the question with consideration being given to the prior ruling, even though the questions be identical. *Remington* v. *Central P. R. Co.*, 198 U. S. 95, 99, 100. Such a rule is particularly appropriate when a federal right is asserted in a federal forum. 45 U. S. C. § 56, 35 Stat. 66.

ARGUMENT.

The Writ of Mandamus Issued by the Court Below Is Based on a Misinterpretation of the Requirements of Full Faith and Credit and Divests the Federal Courts of Jurisdiction Granted by Congress.

The question of Federal law decided by the Court below is whether or not full faith and credit requires the federal courts to ignore federal laws and to transfer a case arising under the Federal Employers' Liability Act solely because a state court, in the exercise of its discretion, had previously dismissed the same case on its finding that it ". . . was an inconvenient and inappropriate forum" (R. 27).

This basic question is unique because no other court has stretched the doctrine of full faith and credit to cover circumstances remotely similar. The only other case dealing with a similar point, *Rodriguez* v. *Pan American Life Insurance Co.*, 5th Cir., 311 F. 2d 429 (1962), suggests that a completely opposite result might occur. In that case, the district court dismissed an action by Cuban refugees on the ground of *forum non conveniens* on its reasoning that the Courts of Cuba were available. On appeal the dismissal was reversed. The Insurance Company suggested that the dismissal could be justified on the ground that Louisiana Courts were available; the *forum non conveniens* having been situated in Florida. The Court rejected this contention and stated at 311 F. 2d 433, 434:

> ". . . Indeed, we think it appropriate to note that should this defendant prevail on this dismissal, there is no assurance that a whole new round of jurisdictional jousting would not be open to invitation. If plaintiffs be required to go now to the Louisiana courts it is not

illogical to assume that defendant could there, once again, invoke the doctrine of *forum non conveniens* on the ground that the Florida courts would be convenient. That is where the plaintiffs started, but still no court would have touched the merits of the claim. Their quest for legal determination of their rights under contract with defendant should be answered."

When the Opinion below is carefully examined, it is clear that the decision concerns full faith and credit only insofar as it implements the doctrine of *res judicata*. This is conceded by Respondent in its Brief in opposition to the petition for writ of certiorari when it states that the Opinion below presents ". . . the narrow question of *res judicata* . . ." (p. 6). The only case cited by the Court below is the case of *Wayside Transportation Co.* v. *Marcell's Motor, Inc.*, 1st Cir., 284 F. 2d 868, 870. In that case, the suit had been brought in a state court in Vermont. Defendant there contested jurisdiction of the person, lost, and did not appeal though the question was certified to the Supreme Court of Vermont before trial. After defendant failed to appear at several pre-trial conferences specially set, a default judgment was entered. When the defaulting defendant sued on the same cause of action in a Massachusetts district court, the default judgment was pleaded in a counterclaim and sustained by the federal court. The Court of Appeals, of course, affirmed the judgment since it is well established law that a person or party who contests jurisdiction and loses on that issue must appeal. As the Court of Appeals there points out, there was no necessity to appear in the Vermont action since the question of jurisdiction was open to litigation in a suit to enforce any judgment obtained. The case is in no way applicable to the present factual situation. That case is based solely on the doctrine of *res judicata*. It is true that full faith and credit implements

that doctrine in the case, but the case would be decided in the same manner absent any application of full faith and credit.

Respondent seeks to justify the judgment here as a correct application of the law of *res judicata* as implemented by the full faith and credit statute (Brief of Respondent in Opposition, p. 3). The Court of Appeals, however, relied exclusively on the full faith and credit language in *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 1st Cir., 284 F. 2d 868, 870 and did not mention *res judicata*. The doctrine of *res judicata*, moreover, applies only to a final valid judgment. *Merriam* v. *Saalfield*, 241 U. S. 22, 28.

Respondent's reliance on *res judicata* is without merit since the Circuit Court of Cook County entered a mere judgment of dismissal and no one has suggested that plaintiff is not entitled to a determination on the merits of his cause of action; the only question being whether such determination should be had in the district court at Grand Rapids, Michigan or before the Petitioner in Chicago, Illinois. In considering the previous dismissal, Petitioner gave respectful consideration to the finding by the Circuit Court of Cook County that it ". .. was an inconvenient and inappropriate forum" (R. 27) and to Respondent's contention, first raised on rehearing, that full faith and credit must be accorded the order of dismissal but decided that comity did not require the transfer and that full faith and credit did not apply. In so deciding, Petitioner also found that the material factual issues were different in the two motions as pointed out in the dissenting opinion (R. 87-91). Petitioner states that he decided the motion under the standards set out in 28 U. S. C. § 1404 (a), 62 Stat. 937, and further decided that Respondent had failed to meet its burden even when aided by the previous judgment of dismissal.

The court below, however, was not satisfied with Petitioner's exercise of discretion and erroneously held that Petitioner had no discretion, could not consider the motion to transfer, and was required to transfer to the forum suggested by Respondent. In so doing, the court erroneously relied on *Wayside Transportation Co.* v. *Marcell's Motor Express, Inc.*, 1st Cir., 284 F. 2d 868, 870 as requiring that full faith and credit be given "... to the order entered by the state court." (R. 86). No consideration is given to the Illinois law that a decision as to a dismissal on the ground of *forum non conveniens* lies primarily within the discretion of the trial court or to the judicial notice taken by the Supreme Court of Illinois that a serious court congestion problem exists in the state courts in Cook County, *Cotton* v. *L. & N. R. Co.*, 14 Ill. 2d 144, 152 N. E. 2d 385, 392, 398. See also *Secco* v. *Chicago Transit Authority*, 2 Ill. App. 2d 239, 119 N. E. 2d 471, where judicial notice was taken by the appellate court in 1954 that the time from filing suit until trial of practically all personal injury cases was 3½ to 4 years.

Despite the discretionary nature of the order and despite the current status of the dockets of the United States District Court in Chicago, the court below ignores all differences and states that a special reason exists for its decision in that the state court and the federal court are courts of concurrent jurisdiction in administering the Federal Employers' Liability Act (R. 86). In the case of *Supert* v. *Miner*, 7th Cir., 266 F. 2d 196, the same circuit held that a federal judge had the right to order a cause of action transferred after a judge of the same court had previously denied the same motion to transfer, stating at 266 F. 2d 198:

> "Implicit in the doctrine of *res judicata* is a final judgment. In the case at bar no final judgment has been entered. We hold Judge Miner had the power and the right to entertain the second motion for transfer."

In another attempt to buttress its judgment, the court below states that if plaintiff had refiled his action in any state court in Cook County it would have been dismissed on the basis of the Circuit Court's dismissal. No authority is given for this conclusion and Respondent has not met its burden of establishing such proposition. But even if true, such fact is irrelevant and wrongfully and erroneously divests the federal court of jurisdiction granted by Congress for the express purpose of extending the jurisdiction of the federal courts beyond the territorial limits of the county in which the federal court sits. Moreover, the Opinion of the Court of Appeals, in inferring and imposing such dismissal, directly conflicts with the Opinion of this Court in *Angel* v. *Bullington*, 330 U. S. 183, 190, 191 which squarely holds that a plaintiff is not barred from litigating in the federal courts unless, and until, it has been finally decided that all of the courts of the state in which he brought his preceding litigation are closed to him. This Court there states the converse of the Court of Appeals proposition and holds that a plaintiff is not barred when only some of the courts of the state are closed to him. Moreover, the court below not only ignores such holding but does so in a case arising under federal law and not by virtue of diversity of citizenship.

The basic error in the equating of the federal court with a county court is seen when a hypothetical case is considered. Assuming that the same injury was sustained by the plaintiff in an occurrence in East Chicago, Indiana, it is plain that the removal of any discretion from the District Court would require the court to transfer the suit to a federal court in Indiana. This would be true even though the place of the accident would be well within the 100 miles within which a federal court may issue a subpoena for trial under the provisions of Rule 45 (e) (1) of the Federal Rules of Civil Procedure. Thus, the decision below would deprive

the federal courts of territorial jurisdiction granted by Congress as well as prevent the determination of the differing questions raised by the federal motion to transfer.

Despite the differences in the material factual issues and in the territorial jurisdictions of the courts here involved, the writ of mandamus was issued in perpetuation of the present conflict between the circuits as to whether such a writ lies, and despite the express reservation of that question in *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 33. (This express reservation was pointed out to the court below in my Brief despite Respondent's disclaimer in its Brief opposing the granting of certiorari, p. 6). Moreover, the Court of Appeals issued the writ not to correct an abuse of discretion in applying the principles as stated in 28 U. S. C. § 1404 (a), 62 Stat. 937, but to order the cause transferred without any consideration of the federal questions raised by the Motion to Transfer filed by the railroad. This is done despite the clear intent of Congress to invest the District Court with a broad discretion on motions to transfer and, specifically, to decide questions relating to the convenience of the parties, the convenience of the witnesses, and the interest of justice. This Congressional intention is confirmed by this Court in *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 33. (The court below, nevertheless, obliterated all discretion, whether broad or narrow, in the circumstances of this case). The discretion vested in the District Court, moreover, is much broader than the applicable law binding the Circuit Court of Cook County. The state law is stated in *Cotton* v. *L. & N. Railroad Company*, 14 Ill. 2d 144, 152 N. E. 2d 385 where the Supreme Court of Illinois held that the issue of the motivation of the plaintiff is the only issue for determination on a Motion to Dismiss on the ground of *forum non conveniens*, stating that only where an FELA plaintiff is motivated purely by vexation and harassment may an Illinois state

court dismiss his action. Thus the Circuit Court was required to base its determination on its finding as to the state of mind of the plaintiff in filing his law suit but instead based its determination on its sole finding that it "was an inconvenient and inappropriate forum". (It is interesting to note that the order of dismissal ignores the only question in such a case (R. 27) though the railroad claimed such "vexation and harassment" in its Motion to Dismiss (R. 13).). The governing principles are therefore seen to be so diverse that no basis whatsoever is provided for the holding of the Court of Appeals.

The Opinion of the Court of Appeals also relies on the fact that the plaintiff took no appeal from the dismissal of his cause of action in the state court. In so doing, the decision wrongfully and erroneously establishes a non-existent doctrine of the exhaustion of judicial remedies which would compel plaintiffs to appeal discretionary orders of state courts or suffer the peril of being barred from enforcing the right to a choice of forum granted FELA plaintiffs in Section 6 of the Federal Employers' Liability Act, 45 U. S. C. § 56, 35 Stat. 66, because of the misapplication and expansion of full faith and credit by the court below.

The court below also relied on the doctrine of estoppel by verdict to buttress its conclusion that full faith and credit barred all consideration of the standards of 28 U. S. C. § 1404 (a), 62 Stat. 937. Such reliance was a misapplication because the order of the Circuit Court did not constitute a final judgment but, instead, was a mere dismissal. Moreover, estoppel by verdict arises only when the party estopped is involved in a suit on a different cause of action and is squarely limited to the questions actually determined by the original action and not to what might have been litigated and determined. *Cromwell* v. *Sac County*, 94 U. S.

351; *Baltimore S. S. Co.* v. *Phillip*, 274 U. S. 316, 319. See *Stangle* v. *Chicago, Rock Island & Pacific R. Co.*, 7 Cir., 295 F. 2d 789, relied on below, in which the doctrine was properly applied in a suit on a different cause of action.

Considered apart from prior decisions, the result below does not commend itself in an orderly administration of justice. The full faith and credit statute; 28 U. S. C. § 1738, 62 Stat. 947; does not provide for recognizing usage or law in a single county of a state but requires a state-wide effect. In addition, neither reason nor common sense would suggest that a plaintiff should be required to appeal discretionary dismissals at the risk of being bound thereby in a different forum. When so held, the court hearing the original motion to dismiss is granted a power, and its order is given an effect, which was never contemplated at the time of the original order. The general policy favoring *res judicata* is surely based on the premise that all parties should contemplate that a final judgment on the merits should end all discussion of the cause of action. But, in the present situation, there should be no policy which would prevent any plaintiff, and especially a Federal Employers' Liability Act plaintiff, from having his right to a federal forum determined by federal statutory standards. The ruling below is fundamentally erroneous in its holding that Petitioner did not abuse his discretion but that instead he did not possess any discretion whatsoever. Such fundamental error is compounded by the fact that a *forum non conveniens* motion addresses itself to problems such as court congestion which which must always be *sui generis* with the court deciding the motion.

The better rule is that the second forum should be free to decide the matter with due consideration given to the prior ruling. This is true even though the questions are identical.

Such a rule was followed in *Brainard* v. *Atchison, Topeka & Santa Fe Ry. Co.*, U. S. D. Ct., Kan., 87 F. Supp. 921 where a prior ruling when the case was in the U. S. District Court in Chicago was re-examined. This general law on the freedom to re-examine interlocutory orders seems far preferable to the binding restrictions placed on Petitioner by the court below. The rule in so treating interlocutory orders is succinctly stated in *Remington* v. *Central P. R. Co.*, 198 U. S. 95, where the state court decided that it had jurisdiction of the person of the defendant, an appeal was taken from that order, and the case was removed to the federal court before the appeal was passed upon. The federal court then re-examined the ruling and held that it did not have jurisdiction over the person and dismissed the suit. This Court affirmed stating through Mr. Justice Holmes at 198 U. S. 99, 100:

> "It is said that the decision of the state court, although appealed from, was *res judicata*. But it stood no higher than a similar decision made by the circuit court, if the case had been begun before that court.
>
> It may be that the defendant would have had no right to renew its motion, but the circuit court would have had had power to give it leave. If the circuit court was satisfied that it, or its predecessor the state court, had made a mistake, it had power to reopen the matter. It did so, and its action in that respect is not open to question here. However stringent may be the practice in refusing to reconsider what has been done, it still is but practice, not want of jurisdiction, that makes the rule."

Such a rule seems particularly appropriate in the circumstances of this case since plaintiff here asserts a federal right which is governed by the Opinions of the federal courts. In the case below, the plaintiff sought only such a determination which was granted by Petitioner. The effect

of the Opinion of the Court of Appeals is to take these matters out of the hands of the federal courts and to require a federal court, sitting in a federal action, to sit as a federal court does in an action brought in its court by virtue of diversity of citizenship. As to such cases, there are many qualifications to the general rule that a federal court sitting in diversity sits as another state court. Until the Opinion below, there was no qualification to the general rule that a federal court sitting in an action brought under federal law was governed solely by federal and not by state law.

CONCLUSION

For the reasons adverted to above and because of the demands of the law and substantial justice, the judgment of the Court of Appeals for the Seventh Circuit granting a Writ of Mandamus should be reversed.

Respectfully submitted,

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